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No. 896

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

JUNIOR LEE WILLIAMS, *Petitioner*

v.

H. E. MOORE, WARDEN, TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Fifth Circuit**

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ALPHA LAW BRIEF CO., 402 M. & M. BLDG., HOUSTON 2

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H. E. MOORE, WARDEN, TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*

## PETITION FOR WRIT OF CERTIORARI

### To the United States Court of Appeals for the Fifth Circuit

Petitioner, Junior Lee Williams, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on January 5th, 1959.

### Citations to Opinions Below

The memorandum opinion of the United States District Court for the Southern District of Texas is unreported and is printed in the accompanying record certified by the

Clerk of the United States Court of Appeals, Fifth Circuit (R. p. 81). The opinion of the United States Court of Appeals, Fifth Circuit is in the certified copy of the record, p. 108, has not yet been officially reported.

## Jurisdiction

The judgment of the United States Court of Appeals, Fifth Circuit, was entered January 5th, 1959 (R. p. 108). Rehearing was denied February 5th, 1959, (R. p. 122).

The jurisdiction of this Court is invoked under 28 *U.S.C.A.*, Sec. 1254(1).

1.

Where the various stays of execution, the first of which was not at the instance of Petitioner, have expired, and there is no Texas Statute authorizing any Court to resentence Petitioner to be electrocuted, whether a resentence by the District Court of Wharton County, Texas, is arbitrary and denies to Petitioner that due process of law and that equal protection of the laws as is guaranteed to Petitioner by the XIV Amendment to the Constitution of the United States.

2.

Where the State Court of last resort has ruled, "It is a familiar and well settled rule that Penal Statutes are to be construed strictly and not extended by implications, intendments, analogies or equitable considerations. Offenses must be plainly written and defined by Legislature, Courts not being permitted to supply what Legislature has from inadvertence or otherwise omitted to include within express provision of Penal Law." And the Courts fail to ap-

ply such rule to facts in Petitioner's case, whether such action deprives Petitioner of due process of law and equal protection of laws as is guaranteed to Petitioner by the XIV Amendment to the Constitution of the United States.

3.

Whether the Federal Court, where no Federal Statute is involved, can refuse to follow the law as announced by the highest Court of a State, in one phase of Petitioner's case, and follow such State's rule in another phase of Petitioner's case without depriving Petitioner of due process of law and equal protection of laws as is guaranteed to him by the XIV Amendment to the United States Constitution.

## Statutes Involved

The Statutory provisions involved are Articles 805 and 806 of the Code of Criminal Procedure of the State of Texas.

They are printed in Appendix A, infra, pages 9-10.

## Statement

Having exhausted all of his remedies in the State Court, Petitioner, Junior Lee Williams, on the 20th day of December, 1957, filed a Petition for Writ of Habeas Corpus against H. E. Moore, Warden, Texas Department of Corrections in the District Court of the United States for the Southern District of Texas, Houston Division. (Tr. 3-11).

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A., Sections 2241-2254, as a Civil action under the Constitution and laws of the United States, viz., the XIV Amendment of said Constitution.

In due time Respondent filed his answer (Tr. 27-33) on the 18th day of January, 1958.

March 10th, 1958, the Court declined to grant the Writ of Habeas Corpus (Tr. 98-99-100). March 21st, 1958, Petitioner moved to reconsider and amend the order of the Court dated March 10th, 1958, (Tr. 100-101), on the same day the Court overruled said Motion.

April 4th, 1958, Petitioner filed Notice of Appeal and his Appeal Bond.

The United States Court of Appeals for the Fifth Circuit affirmed the action of the District Court, by an opinion dated January 5th, 1959, (Tr. 108-117). February 5th, 1959, Petitioner's Motion for Rehearing was denied. (Tr. 122).

## Reasons For Granting The Writ

1.

There is a conflict between the decision of the Court below in the instant case and the cases of Ex Parte: Cross 146 U.S. 271, 36 L. Ed. 969, and *Craemer v. State*, 168 U.S. 124, 42 L. Ed. 407.

This conflict with the two applicable aforementioned decisions of the Supreme Court is present because the decision in the instant case does not recognize the rule of law announced in Ex Parte Cross, (supra), "the postponements were rendered necessary by reason of delays occasioned by the acts of the condemned in his own interest, and the position that he thereby became entitled to be set at large cannot be sustained."

There was an applicable Statute in the Cross case and the stay was at petitioner's instance.

In the instant case the first stay was not at the instance of petitioner and there is no applicable Statute.

The decision of the Court of Appeals does not recognize the rule of law announced in *Craemer v. State*, (supra), wherein the Supreme Court held, "The appointment of another day for the execution of the death penalty, in accordance with a Statute, when the day first appointed has passed during the pendency of an Appeal, is not in denial of due process of law or in violation of the Federal Constitution."

True, the instant case involves a stay of execution, but the first stay was not at the instance of petitioner and in the instant case there is no applicable Statute.

We believe the rule announced by the Supreme Court in Craemer is applicable and of sufficient latitude to controlling here. The plain language, "in accordance with a Statute", means what it says.

In the instant case petitioner cannot be resentenced, "in accordance with a Statute", because there is no Statute.

2.

Another question presented by the instant case is important because the decision of the Court below is in conflict with *Erie R. Co. v. Thompkins*, 304 U.S. 64-78, 82 L. Ed. 1189, wherein the Supreme Court ruled "that the Federal Courts will follow the rulings of the Court of last resort on questions of State law."

In *Ratcliff v. State*, 289 S.W. 1072, and in *Eu inks v. State*, 203 S.W. 2d 339, strict construction in criminal cases is the law of the State.

In Ratcliff (supra), "Penal Statutes are to be construed strictly and not extended by implications, intendments, analogies, or equitable considerations. Offenses must be plainly written and defined by Legislature, Courts not being permitted to supply what the Legislature has from inadvertence or otherwise omitted, to include within express provisions of Penal Law." Eubanks (supra), says, "Penal Statutes must be strictly construed and the more severe the penalty, the more rigid the construction."

The holding of the Court below is in irreconcilable conflict with the holding of the Supreme Court in *Vieneck v. United States*, wherein it is said: "The unambiguous words of a Statute which imposes criminal penalties are not to be altered by judicial construction, so as to punish one not otherwise within its reach, however deserving of punishment his conduct may be."

It is the rule not only in Texas, but also in the Federal Courts that Criminal Statutes must be strictly construed, now with respect to Articles 805 and 806 C.C.P., of Texas, the aforesaid rule was not followed.

3.

The third question set forth is important and involves the right as to whether a Federal Court can follow the rule announced by the Court of last resort in a State in one phase of Petitioner's case and wholly disregard it in another phase of the same case without depriving petitioner of due process and equal protection as guaranteed by the XIV Amendment to the United States Constitution.

The decision of the Court below is in conflict with the holding of the Supreme Court in *Brinkerhoof-Faris Trust*

*Savings Co. v. Hill*, 281 U.S. 673; 50 S. Ct. 45; 74 L. Ed. 1107, "That a violation of the due process clause may be accomplished by the State Judiciary in the course of construing an otherwise valid State Statute; the Federal guaranty of due process extends to State action through its judicial as well as through its Legislative, Executive or Administrative, branch of government.

## Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

_____

*Counsel for Petitioner*

Date_____

## APPENDIX A

28 U.S.C.A. 1254. Courts of Appeals—Certiorari—cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any Civil or Criminal case, before or after rendition of judgment or decree.

### ART. 805 ESCAPE AFTER SENTENCE

If the condemned escape after sentence and before his delivery to the warden, and be not rearrested until after the time fixed for execution, any person may arrest and commit him to the jail of the county in which he was sentenced; and thereupon the court by whom the condemned was sentenced, either in term time or vacation, on notice of such arrest being given by the sheriff, shall again appoint a time for the execution, not less than thirty days from such appointment, which appointment shall be by the clerk of said court immediately certified to the warden of the State Penitentiary and such clerk shall place such certificate in the hands of the sheriff, who shall deliver the same, together with the warrant aforesaid and the condemned person to the warden, who shall receipt to the sheriff for the same and proceed at the appointed time to carry the sentence of death into execution as hereinabove provided. Id.

### ART. 806 ESCAPE FROM PENITENTIARY

If the condemned person escape after his delivery to the warden, and be not retaken before the time appointed for his execution, any person may arrest and commit him to the State Penitentiary whereupon the warden shall

certify the fact of his escape and recapture to the court in which sentence was passed; and the court, either in term time or vacation, shall again appoint a time for the execution which shall not be less than thirty days from the date of such appointment; and thereupon the clerk of such court shall certify such appointment to the warden, who shall proceed at the time so appointed to execute the condemned, as hereinabove provided. The sheriff or other officer or other person performing any service under this and the preceding Article shall receive the same compensation as is provided for similar services under the provisions of Articles 1029 or 1030 of the Code of Criminal Procedure. Id.

## XIV AMENDMENT U. S. CONSTITUTION

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

### Certificate of Service

Copies of this brief have been deposited in the United States Mail at Houston, Texas, and addressed to Counsel for Respondent at Austin, Texas, postage prepaid.

Thos. H. Dent
*Attorney for Petitioner*

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OCTOBER TERM, 1959

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v.

H. E. MOORE, Warden,
Texas Department of Corrections,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### Opinions Below

The memorandum opinion of the United States District Court for the Southern District of Texas is unreported and is printed in the record certified by the Clerk of the United States Court of Appeals, Fifth Circuit (R. p. 81). The opinion of the United States Court of Appeals, Fifth Circuit is reported in 262 F. 2d, p. 335.

## Jurisdiction

The judgment of the United States Court of Appeals, Fifth Circuit, was entered January 5th, 1959 (R. p. 122).

The jursdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

## Question Presented

Where Petitioner's date of execution passes without event and a new date is set for the execution by the District Court, and where there is no specific State statute governing such a situation, but where there is a State statute which provides that in the absence of any specific statute, the common law will prevail, has Petitioner been denied due process of law as is guaranteed him by XIV Amendment of the Constitution of the United States by the setting of a new execution date?

## Statutes Involved

The statutory provisions involved are Articles 23 and 24 of the Code of Criminal Procedure of the State of Texas.

Statutes are printed in Appendix A, infra, page 9.

## Statement

The instant cause had its origin in the trial of Petitioner, Junior Lee Williams, for the offense of rape, such crime having been committed in Matagorda County, Texas. Respondent, H. E. Moore, as Warden of the Texas Department of Correction, Huntsville, Texas, now holds custody of Petitioner by virtue of a certain valid judgment rendered in the 23rd Judical District Court of Wharton County, Texas, on March 12, 1956, in Cause No. 4790, entitled The State of Texas v, Junior Lee Williams, wherein Petitioner was convicted. The Court of Criminal Appeals of the State of Texas affirmed such judgment, overruling two motions of Petitioner for a rehearing and issued its mandate to said District Court of Wharton County, Texas, on March 1, 1957. On March 22, 1957, the District Court of Wharton County, Texas, proceeded to pronounce a death sentence upon Petitioner and commanded that it be executed at the State Penitentiary at Huntsville, Texas, on April 24, 1957. On March 26, 1957, the Honorable Price Daniel, Governor of the State of Texas, issued a proclamation granting Petitioner a constitutional reprieve and such reprieve Petitioner did accept. By virtue of such proclamation, the date for the execution of Petitioner's sentence was stayed to May 24, 1957. Upon application of Petitioner's counsel, the Honorable Hugo L. Black, an Associate Justice of the Supreme Court of the United States, entered an order on April 22, 1957, staying the execution of Petitioner's sentence to and including May

7, 1957. On May 7, 1957, Justice Black entered an order further staying the execution of Petitioner's sentence pending the disposition of his petition for a writ of certiorari by the Supreme Court of the United States. On October 14, 1957, the Supreme Court entered its Order No. 12, Miscellaneous, October Term, 1957, denying said petition for writ of certiorari. The aforementioned stays of execution of Petitioner's sentence having expired by their own terms, said District Court of Wharton County, Texas, by order entered on November 22, 1957, set December 24, 1957, as the date for the execution of Petitioner's sentence. On December 19, 1957, Petitioner filed in the United States District Court for the Southern District of Texas an application for writ of habeas corpus, whereupon that Court by a Memorandum and Order entered on December 20, 1957, stayed the execution of Petitioner's sentence pending final disposition of that application. By Memorandum and Order dated February 21, 1958, the Honorable United States District Court for the Southern District of Texas denied Appellant's application for the writ of habeas corpus, finding same to be without merit, and further declined to enter an order to show cause. An appeal was taken by Petitioner to the United States Court of Appeals, 5th Circuit, and the Court in its opinion dated January 5, 1959, affirmed the judgment of the United States District Court for the Southern District of Texas. From that judgment Petitioner files his writ of certiorari of the United States Supreme Court. The opinion of the Texas Court of Criminal Appeals is reported in 298 S. W. 2d, 590.

## Argument

Petitioner contends that the setting of a new execution date by the District Court of Wharton County, Texas, after the original date for execution of the sentence has passed, is a denial to him of due process of law and of equal protection of the laws under the Federal Constitution. Respondent urges that in the trial of Petitioner and in the original sentencing of Petitioner all aspects of due process of law and equal protection of the laws under the Federal Constitution were met and none of these rights were denied this Petitioner. The fact that the Governor of Texas granted a constitutional reprieve and that subsequently an Associate Justice of the United States Supreme Court granted two stays of the execution pending the disposition of an application for writ of certiorari, and, further that because of these three stays of execution the original date set for execution of the sentence passed, did not prohibit the trial court from bringing Petitioner back into the Court and setting a new date for execution. The setting of a new date of execution by the trial court was a mere administrative act subsequent to the trial in which Petitioner had been afforded all of his constitutional rights. The setting of a new date for execution of one who has been legally tried is not a denial of due process of law under the United States Constitution. Respondent asserts that Petitioner should not be allowed to take advantage of a circumstance which he caused. The stays of execution were granted at the behest of Petitioner,

and the passing of the date of execution as set for May 24, 1957, by the Governor in his constitutional reprieve, occurred only because of Petitioner's application for the Writ of Certiorari which he filed in the United States Supreme Court.

The ministerial act of setting a new executing date by the District Court constituted the performance of a duty ancillary and incidental to the main trial and judgment, and such act was solely a matter of carrying out the Court's judgment which had not been previously complied with due to Petitioner's own action.

The fact that the Legislature of the State of Texas has not expressly enacted a statute on setting a new date for execution when the date of execution has passed without the sentence having been in fact executed does not in any wise preclude the District Court from setting a new date of executon.

Rsepondent would further show in support of his argument that under Article 23 of the Texas Code of Criminal Procedure, Appendix A, p. 9, that the provisions of the code should be liberally construed so that the objectives which the Legislature sought to attain would be accomplished. The Legislature knowing full well that there would be instances and circumstances that were not covered by the provisions of the Code and realizing that a method would be needed to accomplish this, enacted Article 24 of the Texas Code of Criminal Procedure, Ap-

pendix A, p. 9, which states that where the code fails to provide any rule of procedure in any particular case that may arise, then the rules of the common law, upon which all laws in this state are based, shall be applied in that particular case. In determining what the common law rule is, we refer to 16 Corpus Juris, p. 1331, which states that where the day of execution of a prisoner has passed without the sentence of death being executed because the court granted a postponement of the execution on the application of accused, this does not entitle the accused to his discharge for the reason that the sentence of death was not accomplished on the date that the court originally set for execution and the court may, either with or without a new sentence designate another day for the execution of the sentence. On page 1304, par. 3080 of the same volume of Corpus Juris, it is stated that at common law the designation of the time and place of the execution in a capital case, was, strictly speaking, no part of the judgment or sentence.

**The Decision Below Is Clearly Correct**

As stated by the Fifth Circuit Court in its decision, the State District Court has the implied and inherent authority to provide for the execution of its judgment. The court was correct in its holding that this does not contravene the Constituton of the United States. It is well settled law as is stated in *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64, 78:

> "And whether the law of this State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern."

It is Respondent's contention that the principle established in *Erie R. Co. v. Tompkins* has been followed in this instance.

## Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

LEON F. PESEK
Assistant Attorney General

LINWARD SHIVERS
Assistant Attorney General

## NOTICE OF SERVICE

STATE OF TEXAS )
COUNTY OF TRAVIS )

On this ..... day of May, A. D. 1959, personally came and appeared Leon F. Pesek known to me to be the person who makes the hereinafter affidavit.

I, Leon F. Pesek, am attorney for Respondent in the above entitled matter, hereby certify that on the ..... day of May, 1959, I served the Petitioner with a copy of such brief by sending same to his Attorney of Record, Hon. Thomas H. Dent, 2517½ Market Street, Galveston, Texas, said address being the last known address of Petitioner's Counsel by depositing same in a United States Post Office with First Class postage prepaid, in compliance with Rule 33, U.S. Code Annotated.

.....
Leon F. Pesek

Sworn to and subscribed before me this ..... day of May, 1959.

.....
Notary Public in and for Travis County, Texas

## APPENDIX A

Articles 23 and 24 of the Texas Code of Criminal Procedure reads as follows:

### Art. 23. Construction of this Code

"The provisions of this Code shall be liberally construed, so as to attain the objects intended by the legislature: The prevention, suppression and punishment of crime.

### Art. 24. Common law governs

"If this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern.